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AND
RIEF

No. 16-1436

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IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

—v.—

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether plaintiffs have standing to challenge the legality of Section 2(c) of the Executive Order where, among other harms, the Order subjects them to religious condemnation in a particularized manner and interferes with their ability to be reunited with family members.

2. Whether, in light of the overwhelming evidence that the Executive Order was enacted to fulfill President Trump's promise of a Muslim ban, the Fourth Circuit correctly held that Section 2(c) likely violates the Establishment Clause's prohibition against government condemnation of a particular religion.

3. Whether Section 2(c)'s ban on entry of more than 180 million noncitizens from six countries violates the Immigration and Nationality Act.

4. Whether a nationwide injunction was an appropriate exercise of discretion in light of the dispersed location of plaintiffs throughout the country, the nationwide scope of the Executive Order, and the nature of plaintiffs' injuries.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

1) The parent corporation of respondent International Refugee Assistance Project is the Urban Justice Center, Inc.

2) Respondents HIAS, Inc., and Middle East Studies Association of North America, Inc., do not have parent corporations.

3) No publicly held company owns ten percent or more of the stock of any respondent.

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INTRODUCTION

This is an important case. If challenges had not succeeded in the lower courts, our Nation would today be enforcing a travel ban—Section 2(c) of Executive Order 13,780—that the President ordered to further his publicly stated goal of preventing Muslims from entering the United States. Millions of American Muslims would know that, every day, their own government was enforcing a policy that denigrated their religion and their dignity. For many people in this country, including plaintiffs in this case, the ban would reach right into their families, jeopardizing their plans to reunite with loved ones.

Equally important, to allow the ban to go forward, the courts would have had to ignore a mountain of publicly available evidence—even though everyone else in the country, including those of the disfavored faith, could not ignore it. They would have had to set aside this Court's precedents and turn their backs on their traditional and crucial role in disputes where constitutional liberties are at stake.

As important as these issues are, the Court should not grant the petition. To do so would be pointless, because by its own terms, the President's ban expires on June 14, 2017, two days after the filing of this brief. At that point, the government's appeal of the preliminary injunction will be moot.

Even leaving mootness aside, the judgment of the court of appeals does not require this Court's review. The facts of this case are extraordinary, as is the damage that Section 2(c) would have caused. But

the court of appeals carefully and correctly applied this Court's precedents to this unique situation.

The government does not dispute that the full record establishes that Section 2(c)'s primary purpose was to effectuate a ban on Muslims. Instead, it asks this Court to do what the courts below did not: look away from the evidence establishing that Section 2(c) violates one of our basic guarantees of religious liberty.

That is a request for abdication, not deference, and it is a request the court of appeals correctly declined. There is no need for further review.

STATEMENT

Before and after his inauguration, the President's continually updated website called for "preventing Muslim immigration" and "a total and complete shutdown of Muslims entering the United States." App. 10a & n.5. As a candidate, Mr. Trump declared that "Islam hates us" and said that "we're having problems with Muslims coming into the country." App. 11a. He reiterated his demand for a ban of Muslims on multiple occasions. *Id.*

After the election, President-elect Trump was asked whether he still planned to implement some form of a Muslim ban. He responded, "You know my plans. All along, I've proven to be right. 100% correct." App. 49a; *see also* App. 10a-11a, 48a-49a (reviewing multiple previous statements). By then, he had repeatedly announced that he would achieve his Muslim ban by banning individuals from Muslim countries rather than using an explicit religious test. He explained that "[p]eople were so upset when I used the word Muslim," and so he would now be

"talking territory instead of Muslim." App. 12a (stating that constitutional equal treatment is "great" but "I view it differently"); *see also* App. 49a-50a.

i. The January Order

As the court of appeals observed, seven days after the President took office, he issued an Order that "appeared to take this exact form." App. 50a; *see* Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) ("January Order") § 3(c). The January Order banned, for 90 days, entry into the United States by nationals of seven countries. The breadth of this Order was unprecedented. *See* App. 254a. The countries banned in the January Order range from 90 to 99 percent Muslim, and the Order provided for the possibility of an indefinite ban on those or other countries after the initial 90-day period. January Order §§ 3(e)-(f). The Order referenced "'honor' killings," which, as the Fourth Circuit observed, is a "well-worn tactic for stigmatizing and demeaning Islam." January Order § 1; App. 53a n.17; App. 137a-138a & nn.7-8 (Thacker, J., concurring). And it provided preferential treatment for religious minorities, a preference that the President himself explained was designed to give Christian refugees priority over Muslims. January Order § 5(b); App. 13a, 132a-133a (Thacker, J.).

At the signing ceremony, President Trump read the title aloud and then said, "We all know what that means." App. 13a; C.A. App. 403, 778. The following day, when asked how the President had decided to ban the seven designated countries, a

presidential advisor explained that President Trump had approached him to help design a Muslim ban "legally," and his recommendation was that it operate on the basis of nationality. App. 13a; C.A. App. 508-509.

The President issued the January Order "without consulting the relevant national security agencies." App. 53a-54a; *see* App. 213a; C.A. App. 725-26, 804; *see also* App. 131a-132a (Thacker, J.) ("the President actively shielded" the acting Attorney General "from learning the contents" of the Order). Former national security officials aware of intelligence as of a week before the Order was signed submitted sworn evidence that "'[t]here is no national security purpose for a total ban on entry for aliens from the [designated countries].'" App. 9a (quoting C.A. App. 91); *see* App. 54a.

The January Order went into immediate effect and caused widespread chaos. *See, e.g.*, C.A. App. 207, 389-95, 531-34, 583-86. Lawful permanent residents ("LPRs"), individuals with valid visas, and refugees were detained at airports and threatened with removal; families were separated; patients were blocked from medical treatment; and people were stranded in harm's way. Many individuals were prevented from getting on planes to come to the United States; others who had made it here were forced or persuaded to leave without being admitted. The government supplied confusing and contradictory interpretations of the scope of the January Order's ban during the short time that it was in effect. *Washington v. Trump*, 847 F.3d 1151, 1166 (9th Cir. 2017) (per curiam).

Multiple legal challenges ensued, and several courts enjoined aspects of the ban. After the Ninth Circuit declined to stay a nationwide injunction of the Order's ban provisions, *id.* at 1164-1169, the government announced that it would issue a revised Executive Order to replace the January Order.

The reason proffered for the 90-day period was "[t]o temporarily reduce investigative burdens" while the Secretary of Homeland Security reviewed vetting for the seven countries. January Order §§ 3(a), (c). In particular, the Secretary was directed to "immediately" conduct that review and submit a report within 30 days. *Id.* §§ 3(a), (b). These provisions were never enjoined, and remained in force for 48 days until the March Order took effect, but the government did not complete the report required by the January Order. *See* 4th Cir. Oral Arg. at 7:55-8:55.[1]

ii. The March Order

The government took three weeks after the Ninth Circuit's *Washington* decision to draft a replacement Executive Order, and reportedly deferred its release to maximize positive press coverage of an unrelated presidential speech. C.A. App. 537-38.

The President issued the revised Order on March 6, 2017. Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017) ("March Order"). The revised Order is, in most

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[1] *Available at* http://www.uscourts.gov/courts/ca4/17-1351-20170508.mp3.

relevant respects, identical to the January Order, including its title; its list of banned countries (with the exception of Iraq), § 2(c);[2] provision for a possible indefinite ban after the initial ban period expires, § 2(e); various provisions related to refugees, § 6; a discretionary waiver provision, § 3(c); and the reference to "honor killings," § 11(a)(iii). *See* App. 50a-51a. The 90-day, six-country ban appears in Section 2(c) of the revised Order. Section 3 of the Order exempts various categories of people from the Section 2(c) ban, including individuals who have valid visas or other travel permission as of the Order's effective date.

Although the assessment and reporting provisions of the January Order were not enjoined and had already been in effect for 48 days, the March Order restarted the 90-day ban period and 30-day assessment without explanation. *See* March Order § 2. By the express terms of the March Order, the ban will expire on June 14, 2017—90 days after the Order's effective date. *Id.* § 2(c). The effective-date provision governs all parts of the Order, and has never been enjoined. *Id.* § 14.

The Order pointed generally to security concerns about individuals born abroad. *Id.* §§ 1(h)-(i). It cited only two examples, however, in imposing a ban on some 180 million people, and neither example demonstrates a vetting problem with respect to any of the banned countries. The first involved two Iraqi nationals, which, because Iraq was excepted from the March Order, "does not

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[2] The banned countries are Iran, Libya, Syria, Somalia, Sudan, and Yemen.

support *this* ban at all." App. 134a (Thacker, J.). The second concerned a Somali national who was brought to the United States when he was two years old and committed an offense seventeen years later. App. 134a-135a (Thacker, J.); C.A. App. 547-48.

Shortly before the President signed the revised Order, two internal Department of Homeland Security reports became public. One report concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." C.A. App. 419. The other concluded that increased vetting of visa applicants was unlikely to significantly reduce the incidence of terrorism in the United States, because the vast majority of foreign-born extremists radicalized years after immigrating. C.A. App. 423, 426; *see* App. 54a; *see also* App. 9a (noting declaration from former national security officials that there is "'no national security purpose'" for the Order's blanket ban).

The President recently characterized the revised Order as a "watered down, politically correct version [the Justice Department] submitted to the S[upreme] C[ourt]" and asserted that the Department "should have stayed with the original Travel Ban."[3] The President also called for a "much tougher version."[4] Other White House officials have

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[3] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128; *see also* App. 14a, 51a (noting previous time the President characterized the revised version as a "watered down" version of the original).

[4] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871677472202477568; *see also* Donald J. Trump, *A Message From Donald J.*

likewise underscored the common purpose of the two Orders. The White House Press Secretary affirmed that "[t]he principles of the executive order remain the same," and a senior advisor to the President echoed that the revised Order contains "mostly minor technical differences" and achieves "the same basic policy outcome for the country." App. 14a.

iii. The Plaintiffs

The plaintiffs in this case are individuals and organizations who are directly affected by the March Order. The individual Muslim plaintiffs are U.S. citizens and LPRs seeking to reunite with family members who are nationals of banned countries. They have experienced isolation, exclusion, fear, anxiety, and insecurity because of the "anti-Muslim attitudes" conveyed by the Executive Order. C.A. App. 306, 310, 786.

The individual plaintiffs' pending visa petitions are directly affected by the ban.[5] Plaintiff John Doe #1, for example, is a Muslim LPR from Iran with a pending petition for a visa to be reunited with his Iranian wife. C.A. App. 304-05. Other individual plaintiffs with relatives from the banned countries face similar harm. *See* C.A. App. 321-22 (Plaintiff Ibrahim Mohomed); C.A. App. 316-19 (Plaintiff Jane Doe #2).

Trump, Facebook (June 5, 2017), https://www.facebook.com/DonaldTrump/videos/10159253902870725/.

[5] Plaintiff John Doe #3's wife and Paul Harrison's fiancé have been issued visas and admitted to the United States since this suit was filed.

The ban also harms Muslim clients of organizational plaintiffs International Refugee Assistance Project ("IRAP") and HIAS. IRAP provides legal representation to vulnerable populations, particularly those from the Middle East, who are seeking safety and reunification with their family members in the United States. C.A. App. 263. Plaintiff HIAS is the oldest refugee assistance organization in the world. C.A. App. 272. Both IRAP and HIAS, which serve both refugees and non-refugees, have Muslim clients in the United States who are seeking to be reunited with loved ones from the six banned countries. C.A. App. 263, 273, 283. The Order has left their Muslim clients feeling marginalized, isolated, and afraid. C.A. App. 269-70, 285-87. Both organizations have also suffered direct organizational harms because of the Executive Orders. C.A. App. 267, 280-281.

Plaintiff Middle East Studies Association ("MESA") is a U.S.-based membership organization of students and scholars of Middle Eastern studies. C.A. App. 297-98. Muslim members similarly feel "marginalize[d]" and "fear that they will be singled out" because of the Order's "anti-Muslim message." C.A. App. 300. Among other things, the ban, if implemented, would seriously "reduce attendance at its annual conference and cause the organization to lose $18,000 in registration fees." App. 17a; *see* C.A. App. 300-03. The ban also harms MESA's U.S.-based members who seek to collaborate in the United States with individuals from the banned countries. C.A. App. 298-300.

iv. Decisions Below

On March 16, the district court issued a nationwide preliminary injunction of Section 2(c) of the Order. Looking to evidence from "before [the] election, before the issuance of the First Executive Order, and since the decision to issue the Second Executive Order," App. 241a, the court held that the plaintiffs were likely to succeed on the merits of their Establishment Clause claim.

A ten-member majority of the en banc court of appeals agreed that the preliminary injunction should be affirmed in substantial part[6] and that the Order likely violates the Establishment Clause. Seven judges joined the majority opinion in full, and two more concurred nearly in full. A tenth judge concurred in the judgment, also agreeing that Section 2(c) likely violates the Establishment Clause. Three judges dissented.

The majority first concluded that *at least* Plaintiff Doe #1 had standing to assert the Establishment Clause claim. App. 33a-34a. Doe #1, the court explained, would be subjected to "the direct, painful effects of the Second Executive Order—both its alleged message of religious condemnation *and* the prolonged separation it causes between him and his wife—in his everyday life." App. 32a. Having concluded that "at least one Plaintiff possesses standing," the majority did not "need [to] decide whether the other individual Plaintiffs or the

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[6] The court of appeals vacated the portion of the district court's order that directly enjoined the President himself. App. 73a-74a.

organizational Plaintiffs have standing with respect to this claim." App. 34a; *contra* Pet. 15 n.7; App. Stay 24 n.8 (implying that the court concluded other plaintiffs lacked standing).

The court likewise rejected the government's other justiciability arguments, observing that this Court "has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake." App. 34a-36a.

On the merits, the court applied the standard articulated in *Kleindienst v. Mandel*: A court will accept the government's proffered justification if it is "facially legitimate and bona fide." 408 U.S. 753, 770 (1972); *see* App. 38a-39a. Relying on Justice Kennedy's controlling concurrence (joined by Justice Alito) in *Kerry v. Din*, the court explained that "where a plaintiff makes 'an affirmative showing of bad faith' that is 'plausibly alleged with sufficient particularity,' courts may 'look behind' the challenged action to assess its 'facially legitimate' justification." App. 42a (quoting 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment)).

The court held that the plaintiffs had made a "substantial and affirmative showing" that the government's proffered justification was not bona fide. App. 43a-44a, 46a. The court relied on the "ample evidence" that the March Order was an effort to effectuate the promised Muslim ban, and "the comparably weak evidence" to the contrary. App. 44a. Having concluded that the Order failed *Mandel*'s threshold "bona fide" analysis, the court next examined it under the Establishment Clause. App. 45a-46a. Based on the "compelling" record in

this case, the court of appeals concluded that the Order violated longstanding Establishment Clause principles. App. 48a-52a.

The court emphasized the narrowness of its holding: "[I]n this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and [the March Order.]" App. 61a-62a; *see also* App. 252a (district court explaining that this is a "highly unique case").

Three judges wrote opinions agreeing with the majority's Establishment Clause holding and further concluding that the Order is unlawful in various respects under the Immigration and Nationality Act ("INA"). *See* App. 94a-100a (Wynn, J., concurring) (INA analysis applying the canon of constitutional avoidance); App. 76a n.2, 85a (Keenan, J., concurring in part and concurring in the judgment) (finding that the Order violates the INA and is not "facially legitimate"); App. 127a-145a (Thacker, J., concurring) (concluding that the Order likely violates the INA's anti-discrimination provision, 8 U.S.C. § 1152(a)(1)(A), and that it fails constitutional scrutiny even looking only to post-inauguration evidence, App. 130a-131a, 138a).

REASONS TO DENY THE PETITION

I. THE INJUNCTION OF SECTION 2(c) WILL BE MOOT BEFORE THIS CASE IS CONFERENCED.

Review is not warranted because the ban imposed by Section 2(c) will expire on June 14, 2017. At that point, the injunction will be moot.

Section 2(c) plainly states that entry by nationals of the six countries is "suspended for 90 days *from the effective date of this order*" (emphasis added). The effective date of the Order is explicitly defined, in Section 14, as "March 16, 2017." No court has enjoined Section 14, so the entry suspension will terminate on June 14, 2017.

The government initially conceded this before the court of appeals. After the district court enjoined Section 2(c), the government represented in its stay motion in the court of appeals that "Section 2(c)'s 90-day suspension expires in early June." Gov't Stay Mot., Doc. 35, at 11, No. 17-1351 (4th Cir. filed Mar. 24, 2017). This representation was not merely a passing description; it was the premise of the government's argument against one plaintiff's standing. *Ibid.*

Just over a month later, however, the government reversed course, this time arguing that "it does not make sense to treat March 16 as the 'effective date' for purposes of Section 2(c)" because of the injunction. Gov't Resp. to Mot. to Supplement Record at 2, Doc. 291, at 2-3, No. 17-1351 (4th Cir. filed May 5, 2017). But only the President can revise the clear text of his own enactment. *Cf., e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76

(1996) (courts may not "rewrite the statutory scheme in order to approximate what we think Congress might have wanted"). That rule makes particular sense in the context of an Executive Order, which the President can unilaterally revise at any time. He has not done so here.

Instead, the government argued that the *court* could rewrite Section 2(c)'s reference to the Order's effective date by substituting the date the injunctions are lifted. Gov't Resp. to Mot. to Supplement Record at 2, Doc. 291, at 2-3, No. 17-1351 (4th Cir. filed May 5, 2017). But nothing in the Order's text suggests that different provisions can have different effective dates. And the Order's effective date applies to *multiple* provisions, most of which were not enjoined.

And critically, the government's interpretation treats the ban provision as an end in itself, separate from its ostensible purpose of facilitating a review of vetting procedures. If the Court grants the government's request in *Hawai'i* to stay the portion of the injunction that blocks the Section 2 review process, App. Stay at 37-38 & n.10, *Hawai'i v. Trump*, No. 16A1191 (U.S. filed June 1, 2017), the review process will have concluded by the beginning of the Court's next Term. But in the government's view, if the Court lifted the injunction later in the fall, the Section 2(c) ban would still run its full 90-day course—even though all the review procedures the ban was supposed to facilitate would already be complete. That is inconsistent with the Order's stated purpose.[7]

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[7] However, it is not inconsistent with the President's call for a Muslim ban.

There is no reason to go down this atextual road. The Order's predecessor had been enjoined by multiple courts, and the March Order could easily have been written to provide that the effective date would be tolled in the event of an injunction. But it was not. "If [the President] enacted into law something different from what [he] intended, then [he can] amend the [Order] to confirm it to [his] intent." *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004).

The Order means what it says. The ban will expire, and the appeal will be moot, in a matter of days. There is no reason for this Court to grant review.

II. THE COURT OF APPEALS' RULING IS NARROWLY BASED ON AN EXTRAORDINARY SET OF FACTS AND DOES NOT WARRANT REVIEW.

The government calls the court of appeals' holding "remarkable." Pet. 13. But it is the *facts* of this case that are remarkable. Although "[o]utright admissions of impermissible . . . motivation are infrequent," *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999), in this case there is an extraordinary volume of publicly available, undisputed evidence that the Order was intended to disfavor Muslims.

The lower courts' *legal* analysis hewed closely to existing precedents. Both courts avoided any broad holding, emphasizing that the case was *sui generis*. *See* App. 61a-62a (limiting holding to "this highly unique set of circumstances"); App. 252a (noting this is a "highly unique case").

A. This Case Is Justiciable.

"[O]ne of the core objectives" of the Establishment Clause is to ensure that one's standing within the political community is not a function of one's faith—an objective that is directly undermined when the government conveys an official message to adherents of a disfavored religion "that they are *outsiders*, not full members of the political community." App. 25a (internal quotation marks omitted); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000). As the government concedes, "personal and unwelcome contact" with government displays and policies that violate the Establishment Clause has long sufficed to confer standing. *Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012) (collecting cases); *see* Pet. 18 (acknowledging spiritual injuries are cognizable) (citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 n.22 (1982)).

Multiple plaintiffs—and clients and members of the organizational plaintiffs—have standing. Their lives have been directly and meaningfully affected by the Order, and they have been injured by Section 2(c)'s message that, as Muslims, they are not a welcome part of our national community.

The government attempts to escape this conclusion by inventing new standing requirements, and by ignoring all the plaintiffs other than John Doe #1. None of its proposed limitations withstands analysis. The government first suggests that condemnation injuries are cognizable only if inflicted by a "local or state government." Pet. 18. But there is no basis for that supposed rule. Indeed, the

Establishment Clause originally restricted *only* the federal government. *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 13 (1947).

Next, the government argues that a statement or practice must "explicitly address[] religion" to cause cognizable harm. Pet. 18. But as this Court has explained, "[f]acial neutrality is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *see Santa Fe*, 530 U.S. at 307 n.21. If the government's point is that "Section 2(c) does not [*in fact*] expose plaintiffs to a religious message," Pet. 18, the court of appeals rightly rejected this attempt to conflate the standing and merits inquiries. *See* App. 24a, 30a n.9.

Finally, the government argues that Muslims like Doe #1 have not been "personally exposed" to Section 2(c) because it targets "aliens abroad." Pet. 18. The Order's harm cannot be minimized so easily. For Doe #1, the ban "does not apply to arbitrary or anonymous 'aliens abroad.' It applies to his wife." App. 32a. It threatens to nullify his own visa petition on her behalf. And it could "force[] [him] to choose between [his] career and being with [his] wife." App. 25a-26a.[8]

This Court has long recognized that a governmental display targeted at no one in particular, such as a crèche, a cross, or the Ten

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[8] This case therefore bears no resemblance to *Valley Forge*, *see* Pet. 17-19, where the plaintiffs alleged "nothing else" beyond a bare claim that "the Constitution has been violated," 454 U.S. at 485-87, or to *In re Navy Chaplaincy*, 534 F.3d 756, 764-65 (D.C. Cir. 2008), where the plaintiffs were not "affected by [the] government *action*" in any way. *See* App. 32a n.11.

Commandments, can violate the Establishment Clause rights of those who come into unwelcome contact with the display. *Cf. McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844 (2005) (plaintiff injured by encountering Ten Commandments monument at county courthouse); *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (same for crèche), *abrogated on other grounds by Town of Greece v. Galloway*, 134 S. Ct. 1811, 1821 (2014).[9] If that kind of contact confers standing, surely plaintiffs, whose lives and families have been upended by the Order, also have standing to raise Establishment Clause challenges.

The Order is "a daily experience of contact with a government that officially condemns [their] religion." *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 n.33 (9th Cir. 2010) (en banc); *see id.* at 1048. It has injected itself into plaintiffs' homes and families. That is precisely its point—to "delay the issuance of visas." App. 27a. In fact, the government has admitted that pending applications like Doe #1's may actually "not be delayed, but *denied*," in which case he would be forced to restart the lengthy process "*from the beginning*." App. 28a. The plaintiffs did not "roam the country in search of government wrongdoing." *Valley Forge*, 454 U.S. at 487. The President's Order found them.

Additionally, though the government largely ignores them, *see* Pet. 15 n.7, IRAP, HIAS, and MESA also have standing. Muslim clients of IRAP

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[9] *Allen v. Wright*, 468 U.S. 737 (1984), is not to the contrary, as it involved a generalized equal protection claim, not a specific and personal Establishment Clause claim. *See Awad*, 670 F.3d at 1123 n.8.

and HIAS are petitioning for visas for relatives to travel from the banned countries. C.A. App. 263, 270, 273, 283. Like other members of their religious community, IRAP and HIAS's Muslim clients have been marginalized and frightened by the Order's condemnation of their religion. C.A. App. 269-270, 286-287. IRAP and HIAS have standing as representatives to vindicate their clients' rights, and also have standing on their own, because the ban forces them to divert resources in order to find alternative routes to safety for their clients. C.A. App. 267; 280-281.

MESA's annual conference is in November, and the ban would prohibit MESA members from obtaining visas in time to attend. C.A. App. 298-301; *cf.* Pet. 15 n.7 (ignoring that it takes time to obtain a visa). Section 2(c) thus imposes a concrete harm on MESA itself. *See McGowan v. Maryland*, 366 U.S. 420, 430-431 (1961). Additionally, MESA's Muslim members are injured by the Order's expression of condemnation, as well as other aspects of its operation. C.A. App. 300.

Finally, the doctrine of consular nonreviewability has no bearing here. *See* Pet. 14. The doctrine does not bar constitutional claims by persons in the United States. App. 35a (citing *Din*, 135 S. Ct. at 2132). Furthermore, the plaintiffs in this case suffer Establishment Clause injuries whether a visa is ultimately granted or denied.[10] As

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[10] For the same reason, the speculative possibility of a waiver does not make the claim unripe, because the injury derived from the Order's condemnation of plaintiffs' faith is immediate and ongoing, and not eliminated by the grant of a waiver. Pet. 16; *see* App. 34a-35a (rejecting this argument).

the court of appeals noted, "the casual assertion of consular nonreviewability" is really a request for "judicial abdication," which this Court has "not countenanced . . . , especially where constitutional rights, values, and principles are at stake." App. 36a.

B. The Court of Appeals Correctly Applied This Court's Constitutional Precedents.

The court of appeals' conclusion that Section 2(c) violates the Establishment Clause by targeting Muslims for disfavor also does not warrant this Court's review. Government action condemning a particular denomination violates the "clearest command of the Establishment Clause." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The decision below rested on a faithful application of this Court's precedents. The court of appeals afforded the executive "significant deference" and applied a "high bar" to the plaintiffs' constitutional claim. App. 43a. Even so, the court of appeals concluded that Section 2(c) "would likely fail *any* purpose test," because "[t]here is simply too much evidence" in the record demonstrating that its primary purpose was to disfavor Muslims. App. 65a n.22 (emphasis added).

1. *The Court of Appeals Correctly Applied* Mandel.

The court of appeals correctly applied the standard articulated in *Mandel* and Justice

Kennedy's controlling concurrence in *Din*.[11] Under that standard, courts do not look behind a "facially legitimate and bona fide reason" for an order. *Mandel*, 408 U.S. at 770. A "bona fide" reason is given "sincerely," "honestly," and "with good faith." Bona Fide, *Black's Law Dictionary* 223 (4th rev. ed. 1968); App. 42a. Thus, as Justice Kennedy and Justice Alito explained, if a challenger makes "an affirmative showing of bad faith," it *is* appropriate to "look behind" the explanation on the face of the order. *Din*, 135 S. Ct. at 2141 (quoting *Mandel*, 408 U.S. at 770).

The "affirmative showing" is a high bar, and plaintiffs in other cases have consistently failed to clear it. *See, e.g.*, *Cardenas v. United States*, 826 F.3d 1164, 1172-73 (9th Cir. 2016); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009). But, as the court below correctly found, the "ample evidence" in this "unique" case is more than sufficient to satisfy that standard. App. 44a, 61a.

The government would revise *Mandel* and *Din* to hold that courts may *never* "look behind" the explanation on the face of an order. The government's revision would render the *Mandel* standard virtually meaningless and permit the executive branch to act in open bad faith. On the government's theory, the President could have explained, while signing the Order, that "the purpose of this ban is to establish that Muslims are not

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[11] Plaintiffs have consistently argued that the Order fails under *Mandel*. Plaintiffs also maintain that *Mandel* does not apply where, as here, plaintiffs' claims ultimately turn on the effect of the Order on their religious freedom, and not on whether their loved ones, clients, and members are ultimately denied visas.

welcome in America," and courts would have had to look away. The court of appeals was correct to reject such a radical principle.

None of the cases in which this Court has applied *Mandel* has involved an allegation, much less an affirmative showing, of bad faith. The plaintiffs in *Mandel* and *Din* alleged that the government had not provided enough explanation for its conclusions, but they did not allege that it had acted with an impermissible purpose. *See Mandel*, 408 U.S. at 769; *Din*, 135 S. Ct. at 2131; *see also Fiallo v. Bell*, 430 U.S. 787 (1977) (applying *Mandel* in facial challenge to statutory criteria for visas, with no allegation of an impermissible purpose).[12] The Court rejected these arguments, because the government *had* provided a facially legitimate explanation. But the Court emphatically *also* required that the government's reason be bona fide.

Justice Kennedy's concurrence in *Din* confirms this. It begins the "bona fide" analysis by citing a case (relied on by the government here) in which the Court had considered an improper-purpose allegation—that a government action was motivated by "conspiracy, fraud or deception." *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926) (cited in *Din*, 135 S. Ct. at 2140; Pet. 29). There, the Court explained that it would presume a proper purpose,

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[12] The government was wrong when it told the court of appeals that Mandel's visa was denied for the illicit reason that "he was a communist." 4th Cir. Oral Arg. at 49:13-49:30. There was no secret about that: *Everyone* who was subject to the same provision as Mandel was deemed a communist, 408 U.S. at 755, 768 n.7, and Mandel conceded he could validly be excluded on that basis, *id.* at 767.

but *only* "in the absence of clear evidence to the contrary." *Ibid.* There is precisely such clear evidence here.

The lower courts have understood *Mandel*'s "bona fide" prong the same way—especially after *Din*. *See, e.g.*, *Cardenas*, 826 F.3d at 1173 (rejecting claim of racial discrimination because the plaintiff did "not plausibly establish that the decision . . . was made on a forbidden racial basis"); *Am. Acad. of Religion*, 573 F.3d at 137 (explaining that "a well supported allegation of bad faith . . . would render the decision not bona fide"). No court has ever adopted the government's illogical interpretation of "bona fide."

The government is thus wrong about both "what *Mandel* said" and "what it did." Pet. 23. This Court has never held that courts must close their eyes to affirmative evidence that the executive branch has acted with an unconstitutional purpose.[13]

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[13] In addition to its improper purpose, the Order is not "facially legitimate." *Mandel*, 408 U.S. at 770. The text of the Order effectuates a religious gerrymander, targeting Muslims almost exclusively. App. 4a n.2; App. 137a (Thacker, J., concurring). It invokes the religious stereotype of "honor killings," which "is a well-worn tactic for stigmatizing and demeaning Islam," and amounts to "anti-Islamic dog-whistling." App. 53a n.17; *see also* App. 138a (Thacker, J., concurring) (noting that "honor killings have no connection whatsoever to the stated purpose of the Order"). The Order is illogical, factually incorrect, and does not conform to the statutory authority it invokes. App. 76a n.2, 82a-87a (Keenan, J.); App. 134a-138a (Thacker, J., concurring).

2. *The Order Fails Any Purpose Test.*

In reviewing Section 2(c)'s purpose, the court of appeals followed this Court's precedents. It has long been settled that the Establishment Clause "forbids an official purpose to disapprove of a particular religion." *Lukumi*, 508 U.S. at 532. In applying that prohibition, the court of appeals did not attempt to divine the President's subjective intent. Rather, in line with this Court's cases, it considered what "members of the listening audience [would] perceive," and in doing so, declined to "turn a blind eye to the context in which th[e] policy arose." *Santa Fe*, 530 U.S. at 308, 315.

The condemnatory character of the government's action is highly significant and extremely unusual. Many Establishment Clause cases involve challenges to government actions that, by *promoting* a particular religion, are said to implicitly treat non-adherents as outsiders. These cases have produced a variety of results, based on the particular facts and circumstances at issue. But governmental *condemnation* of a religion has no conceivable legitimate purpose, and as a result is exceedingly rare. Where it occurs, courts must be especially vigilant. *See Lukumi*, 508 U.S. at 532 (collecting cases).[14]

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[14] *Accord* Joseph Story, *Commentaries on the Constitution of the United States* § 1870 (1833) ("supporting" religion and its adherents "is very different from . . . punish[ing] them for worshipping God in the manner, which, they believe, their accountability to him requires").

One week into office, the President signed the first Order, which singled out overwhelmingly Muslim countries, and invoked the term "honor killings." January Order § 1. The Order also established a preference that was intended to benefit Christians over Muslims, as the President explained on national television. *Id.* §§ 5(b), (e); App. 13a. That day, and every day for the first three months after the inauguration, the President's regularly-updated campaign website called for "preventing Muslim immigration." App. 10a n.5; App. 130a n.2 (Thacker, J.).[15] The day after the President signed the Order, his close advisor explained that the President had asked him to design a Muslim ban that could survive litigation, and that the advisor had suggested using geography. App. 13a. The President and his administration have been clear that the second Order is a continuation of the first, with "the same basic policy," albeit in a "watered down" form. App. 50a-51a; *see also* App. 127a (Thacker, J.) (finding improper purpose based solely on post-inauguration events). Most recently, the President stated that he preferred the first Order, and dismissed his own second Order as a "politically correct" version of the first.[16]

The court of appeals appropriately considered the context in which the President signed these Orders. He repeatedly called for a "shutdown of

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[15] The call to block Muslim immigration was not taken down until shortly before the Fourth Circuit argument on May 8, 2017. *See* App. 10a-11a n.5.

[16] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128.

Muslims entering the United States" on the rationale that "Islam hates us." App. 49a. When people became "upset" that he had "used the word Muslim," he explained, he decided to start "talking territory instead of Muslim." App. 12a. The first Order was signed a week into his Administration. As the President himself observed when he read the Order's title, "We all know what that means." App. 13a.

In short, there is a surfeit of publicly available evidence demonstrating that the Order's purpose is to disfavor Muslims. And the government has chosen not to "meaningfully address[]" that evidence—a notable omission. App. 52a; App. 247a.

The purported national security rationale for the Order has never been supported by more than *ipse dixit* and self-evidently faulty logic. *See* App. 82a-86a (Keenan, J.). The March Order's stated reasoning, applied neutrally, would have resulted in non-Muslim countries being banned. App. 135a-36a (Thacker, J.). The Order cites only a single inapposite incident involving a person from any of the banned countries, a Somali who was brought to the United States when he was two years old. March Order § 1(h); App. 102a (Wynn, J.); *cf. Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003).[17] Even this

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[17] The original version was dramatically over-inclusive: It covered tens of thousands of LPRs, *see Washington*, 847 F.3d at 1165-66, who do not require visas; improved visa vetting procedures could not have affected them. January Order § 3(c). The revised version is dramatically under-inclusive: Despite its professed security rationale, the Order would allow tens of thousands of nationals from the banned countries with existing visas or other travel permission to freely enter the country without any additional vetting. March Order §§ 3(a)(ii), (a)(iii), (b)(iii); *see Republican Party of Minn. v. White*, 536 U.S. 765,

half-hearted evidence was "offered only after courts issued injunctions against the First Executive Order." App. 252a. Indeed, as the government explained, it "compile[d]" this "additional factual support" following the *Washington* decision as a post hoc defense of the already-chosen policy. Gov't Stay Reply, Doc. 102, at 2-3 (4th Cir. filed Apr. 5, 2017). March Order §§ 1(c), (h)(i); App. 54a ("[A]gencies only offered a national security rationale *after* [the January Order] was enjoined.").

As the government has conceded, the President issued the January Order without consulting *any* of the relevant national security agencies. App. 53a-54a. In fact, he "actively shielded" officials with relevant expertise from learning about the ban before issuing it. App. 131a (Thacker, J.). In light of these facts, the government's repeated assertion that the President "consult[ed]" multiple agencies and its suggestion that he chose to institute a ban because of their "recommendation" rings hollow. Pet. 2, 5, 6, 13, 29, 33.[18] The contention that the revision of the Order

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780 (2002) ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest.") (citation and quotation marks omitted).

[18] The two-page letter on which the government seeks to rely, dated March 6, 2017—the same day the *revised* ban was issued—recommended exactly what the President had already done without any consultation. Pet. 6 n.3. The boilerplate letter, plainly prepared in contemplation of litigation, does not refer to any particular countries, is not mentioned in the Order, and does not indicate that the officials actually consulted on the development of the Order released that day or the January Order in which the ban was originally set forth.

demonstrates "good faith" on the President's part is also belied by the record, especially the President's own statements. *See, e.g.*, Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak'*, Time (Mar. 16, 2017) ("I wasn't thrilled, but the lawyers all said, oh, let's tailor it. This is a watered down version of the first one . . . . And let me tell you something. I think we ought to go back to the first one . . . ."); [19] Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017) (attributing the "watered down, politically correct" March Order to the "Justice Dept." and saying the Department "should have stayed with the original"); [20] Donald J. Trump, *A Message From Donald J. Trump*, Facebook (June 5, 2017) ("We need . . . a MUCH TOUGHER version" of the "Travel Ban"). [21]

The government's own expert studies confirm that, without the purpose to exclude Muslims, Section 2(c) never would have existed. One report concluded that increased vetting procedures were "unlikely to significantly reduce terrorism-related activity in the United States." App. 9a; C.A. App. 426. Another concluded that a person's nationality is not a reliable indicator of whether a noncitizen presents a security risk. App. 9a; C.A. App. 423-424.

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[19] *Available at* http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/.

[20] *Available at* https://twitter.com/realDonaldTrump/status/871675245043888128.

[21] *Available at* https://www.facebook.com/DonaldTrump/videos/10159253902870725/.

Likewise, national security officials who were aware of all the relevant intelligence *one week* before the first Order submitted evidence that the ban served no national security purpose at all. C.A. App. 663-668. History counsels against ignoring such evidence in these circumstances. *See Korematsu v. United States*, 584 F. Supp. 1406, 1417-1419 (N.D. Cal. 1984) (detailing how internal reports undermined any basis for Japanese internment).

Understanding Section 2(c)'s purpose does not require any "judicial psychoanalysis"; it does not turn on what the drafters felt in their "heart of hearts." *McCreary*, 545 U.S. at 862. It simply requires paying attention to public, "readily discoverable fact[s]": the text and operation of the ban, its context, and the President's words. *Ibid.*; *see* App. 51a-52a. The court of appeals committed no error in weighing the remarkable evidence in this case, or in its application of this Court's Establishment Clause precedents to those facts.

3. *The Government's Proposed Evidentiary Restrictions Do Not Warrant Consideration.*

The government suggests a variety of categorical restrictions on the evidence that courts can consider, none of which is supported by logic or precedent. Adherents of a disfavored faith cannot artificially limit the expressions of condemnation they perceive. This Court should not either.

1. The government first proposes limiting review to the text of the Order itself or, perhaps, to what the government deems "official" statements. Pet. 26-28; *but see* Elizabeth Landers, *White House:*

Trump's Tweets Are "Official Statements," CNN (June 6, 2017).[22] The court of appeals rightly rejected that approach as "unworkable" and "an artificial distinction between 'official' and 'unofficial' context." App. 58a. The government's suggestion clashes with this Court's repeated instruction not to "turn a blind eye to the context in which [a] policy arose." *Santa Fe*, 530 U.S. at 315. In analyzing governmental purpose, the Court has relied on relevant statements by private pastors, *McCreary*, 545 U.S. at 869, statements by members of the public, *Lukumi*, 508 U.S. at 541, letters to the editor and newspaper advertisements, *Epperson v. Arkansas*, 393 U.S. 97, 107-08 & n.16 (1968), and speeches by students, *Santa Fe*, 530 U.S. at 295 & n.2, 297 n.4.[23]

2. The government alternatively contends that the Court should ignore what President Trump said about the ban before the election. Pet. 28-30; *cf.* App. 130a-136a (Thacker, J.) (finding improper purpose without reference to campaign statements).

That, again, is simply not the law. This Court has considered statements from political campaigns when they are probative. *See, e.g., Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982)

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[22] *Available at* http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html.

[23] The Court has also relied on public presidential statements in a variety of contexts. *See, e.g., San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 545 n.27 (1987) (relying on remarks by President Carter and the Attorney General); *Myers v. United States*, 272 U.S. 52, 152, 167-170 (1926) (relying on statements in speeches by Presidents Jackson, Grant, Cleveland, Wilson, and Coolidge).

(relying on campaign statements in equal protection challenge); *Epperson*, 393 U.S. at 108 n.16 (relying on campaign materials in Establishment Clause challenge); *see also Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003) (relying on campaign promises in Establishment Clause challenge).

Virtually all of the government's observations about campaign statements, *see* Pet. 28 ("short-hand for larger ideas"); *ibid.* (often "modified, retracted"), apply equally to post-campaign statements. And the fact that they "often are made without the benefit of advice from an as-yet-unformed Administration," *ibid.*, hardly minimizes their relevance to the Orders' purpose—especially when those statements continue to be repeated and reinforced post-election, and the policy was in fact set without agency consultation. The government's contentions boil down to unsubstantiated speculation that courts will misuse campaign statements. *See* Pet. 29-30. But "[e]xamination of purpose . . . makes up the daily fare of every appellate court in the country," *McCreary*, 545 U.S. at 861; *see* C.A. App. 63a-64a, and courts are well equipped to determine what weight to give to any particular statement.

Likewise, the government's specter of "chill[ing] campaign speech" is a red herring. *See* Pet. 30. Here, the Order could be invalidated purely on the basis of post-election statements, App. 127a (Thacker, J.), and in any case the relevant campaign promises were specific, repeated, never repudiated, confirmed post-election, immediately enacted, and amply corroborated in the Order's text, operation, and contemporaneous statements.

Far more troubling consequences flow from the government's request for absolute deference. Such a holding would, as Justice Jackson warned in *Korematsu v. United States*, "lie[] about like a loaded weapon." 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). The government conceded at oral argument that, under its view of the law, if a President made repeated anti-Semitic statements, said he wanted to exclude Jews from the United States, explained that he was going to do it by focusing on geography, and then issued an Executive Order banning all travel from Israel, citing recent terrorism in that country in the Order itself, that ban would be valid. 4th Cir. Oral Arg. at 1:55:20-1:58:00. That extraordinary concession reveals the lengths to which the government has had to go to defend this Order.

C. The Scope of the Injunction Is Reasonable and Appropriate.

The scope of the injunction likewise offers no reason for review. The scope and nature of plaintiffs' injury defines the necessary relief. *See* Pet. 31 (citing *Lewis v. Casey*, 518 U.S. 343, 357 (1996)); *see Lewis*, 518 U.S. at 359 (affirming that "a systemwide impact" calls for "a systemwide remedy" (citation omitted)). Here, the nationwide injunction is amply justified by the nature of the injuries and their "systemwide" impact on the plaintiffs and their clients and members.

The government posits that an injunction limited to Doe #1 would be sufficient, Pet. 31-32, ignoring the other plaintiffs in the case, all of whom, as noted above, have standing. The government has not even attempted to explain how limited relief

would remedy the nationwide harms to the organizational plaintiffs. The organizations have Muslim clients and members throughout the country. During the course of the chaotic implementation of the original Order, IRAP responded to more than 800 queries on an emergency basis and developed guidance for its network of more than 2,000 pro bono attorneys and law students. C.A. App. 264-65. It will bear a similar burden if the current injunction is lifted. MESA anticipates that many of its members will be unable to travel to its annual meeting in November, which provides almost half of its revenue. C.A. App. 300-301. The government has not suggested that anything short of a nationwide injunction could "provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994) (citation omitted).

The government suggests that even if Section 2(c) is facially unconstitutional, the district court should have enjoined it only as to Doe #1. By that reasoning, the proper remedy in *Santa Fe* would have been earplugs so the student plaintiffs would not hear the invocation at football games, and in *McCreary* would have been temporarily covering the Ten Commandments display when the individual plaintiffs visited the courthouse. That approach is both incorrect and unworkable, particularly given that plaintiffs and their clients and members are spread out across the country.

III. THE PRESIDENT HAS EXCEEDED HIS STATUTORY AUTHORITY, ESTABLISHING AN ALTERNATIVE BASIS TO AFFIRM.

The court of appeals did not decide whether Section 2(c) is statutorily authorized. App. 22a. It is not, and, were the Court to grant certiorari, the President's lack of authority under the INA would provide an alternative ground to affirm. *See* App. 76a-77a (Keenan, J.); 89a-90a (Wynn, J.); 127a (Thacker, J.); 231a-39a (district court).

First, the President has not fulfilled the express requirements of 8 U.S.C. § 1182(f) itself. He did not make an actual finding that these noncitizens' entry "would be detrimental to the interests of the United States," as required by § 1182(f). App. 82a-87a (Keenan, J.). For example, while the Order alludes to "hundreds" of crimes by "persons born abroad," it only cites *one* such individual from *any* of the six countries it bans—and he came to the United States as a two-year-old. App. 134a (Thacker, J.). Indeed, as the government conceded, the premise of Section 2(c) is the *lack* of a finding: "[T]he President is 'not sure' whether any of the 180 million nationals from the six identified countries present a risk." App. 85a (Keenan, J.). Section 1182(f) requires more than stereotypes and unsupported doubt.[24]

Second, Congress could not have intended to grant the President the authority to "act in total

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[24] Every prior invocation of § 1182(f) has offered a factual basis that logically supported the exclusion of the relevant class of noncitizens. C.A. App. 116-20.

disregard of other material provisions of the INA, thereby effectively nullifying that complex body of law enacted by Congress." App. 82a (Keenan, J.); *cf. Clinton v. City of N.Y.*, 524 U.S. 417, 439-440 (1998) (repeal of statutes must take place within the Constitution's "single, finely wrought and exhaustively considered, procedure" (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983))). If the government's expansive interpretation of § 1182(f) were correct, the President could impose a blanket ban on all immigration with exceptions and waivers of his choosing, thereby unilaterally supplanting Congress's detailed criteria for admission and grounds for inadmissibility. *See, e.g.*, 8 U.S.C. § 1182(a).

Third, Congress has rejected just the kind of generalization underlying the broad sweep of Section 2(c)'s exclusion. The INA's anti-discrimination provision forbids discrimination "in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). This provision reflects a common principle in our law: Reducing individuals to such characteristics is "odious to a free people whose institutions are founded upon the doctrine of equality." App. 91a (Wynn, J.) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *cf. Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."). Section 1152(a)(1)(A) thus provides further proof that Section 2(c)'s broad-brush approach is not authorized under the INA.

Finally, "construing Section 1182(f) as authorizing the President to engage in invidious discrimination is plainly inconsistent with basic constitutional values" and therefore "raise[s] serious constitutional problems." App. 106a-107a (Wynn, J.) (quoting *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)); *see also* App. 109a (rejecting a classification "inexplicable by anything but animus towards the class it affects") (quoting *Romer v. Evans*, 517 U.S. 620, 632, 636 (1996)). The government's "expansive" reading of the statute, Pet. 22, raises just such problems. For all these reasons, Section 2(c) violates not only the Establishment Clause but also congressional intent.

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Immigration authority and national security concerns "cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within [their] ambit." *Unites States v. Robel*, 389 U.S. 258, 263 (1967). "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *Id.* at 264. The blank check the government seeks in this case is not consistent with our Constitution. "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008). The Fourth Circuit carefully and faithfully applied these hard-learned lessons. There is no need for further review—especially given the looming mootness of the government's appeal.

CONCLUSION

The Court should deny the petition.

Respectfully Submitted,

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